

JUN 15 2009

**FEDERAL ELECTION COMMISSION**

999 E Street, N.W.  
Washington, D.C. 20463

**FIRST GENERAL COUNSEL'S REPORT**

Pre-MUR 480

DATE SUBMITTED: 10/08/08

DATE ACTIVATED: 11/03/08

EXPIRATION OF SOL: 06/01/2012

**SOURCE:**

Sua Sponte Submission

**RESPONDENTS:**

Itinere North America, LLC

Itinere Infrastructure, LLC

Itinere Infraestructuras, S.A.

**RELEVANT STATUTES  
AND REGULATIONS:**

2 U.S.C. § 441e

11 C.F.R. § 110.20(b)

11 C.F.R. § 110.1(g)

**INTERNAL REPORTS CHECKED:** FEC Database

**FEDERAL AGENCIES CHECKED:** None

**I. INTRODUCTION**

This matter was initiated by a *sua sponte* submission ("Submission") filed by William W. Thompson, Jr. of Peckar & Abramson, P.C. ("Counsel") on behalf of Itinere North America, LLC ("Itinere N.A."), its parent company, Itinere Infrastructure, LLC, and their "upstream parent company," Itinere Infraestructuras, S.A. ("Itinere S.A."). According to the Submission, from June 2007 through early January 2008, Itinere N.A. made 67 campaign contributions totaling \$52,750 to 57 different candidates or party committees in Virginia. Following news reports in early July 2008 about alleged violations of federal election laws by another foreign-owned company in Virginia, Itinere N.A. conducted an internal review, and

1 commissioned Peckar & Abramson, P.C. to conduct an independent investigation to  
2 determine if Itinere N.A. had also violated the law. The Submission concludes that Itinere  
3 N.A. made illegal contributions in connection with a state election using funds provided by  
4 Itinere S.A., a foreign national corporation, and channeled through Itinere N.A.'s domestic  
5 holding company parent, Itinere Infrastructure, LLC.

6 The Submission states that the Respondents would like to resolve this matter "in a  
7 manner that protects the public interest, while taking steps to avoid future violations of the  
8 applicable federal statutes and FEC regulations." The Submission further states that the  
9 Respondents have made a full and timely disclosure and implemented all of the remedial  
10 measures prescribed in the Commission's self-reporting policy, including Itinere N.A.'s  
11 request to all of the recipients of the political contributions at issue that they remit those  
12 contributions to the U.S. Treasury. Based on these facts and circumstances, Respondents  
13 request that the Commission take no action against the Respondents, or their current or former  
14 employees, or, alternatively, pursue this matter through Fast-Track Resolution ("FTR")  
15 pursuant to the Commission's Sua Sponte policy, 72 Fed. Reg. 16,695 (Apr. 5, 2007), prior to  
16 any formal findings by the Commission.

17 As discussed in more detail below, because Itinere N.A. made illegal contributions in  
18 connection with a state election using funds provided by Itinere S.A., a foreign national  
19 corporation, and channeled through Itinere Infrastructure, LLC, we conclude that Itinere  
20 North America, LLC, Itinere Infrastructure, LLC, and Itinere Infraestructuras, S.A. violated  
21 2 U.S.C. § 441e. In light of the Respondents' prompt and thorough disclosure of the

violations, however, we have pursued this matter through FTR and recommend that the Commission accept the attached negotiated conciliation agreement and close the file.<sup>1</sup>

## **II. FACTUAL AND LEGAL ANALYSIS**

### **A. Factual Summary**

Itinere North America, LLC, was formed under Maryland law on March 5, 2007. It is an operating company that develops proposals for new potential toll road concession projects in the United States. Itinere N.A. is wholly owned by Itinere Infrastructure, LLC, which was formed under Delaware law and acts as the holding company for Itinere N.A.<sup>2</sup> Itinere Infrastructure, LLC is wholly owned by its parent company, Itinere S.A, a holding company organized under the laws of and headquartered in Spain. Itinere S.A. develops and operates toll road concessions in a number of locations in the United States.

In relevant part, the Submission provides the following facts concerning the Respondents' political contributions in Virginia. In 2006, Itinere S.A. retained the Virginia law firm of Reed Smith, LLP ("Reed Smith"), to provide legal advice, political consulting, and bidding strategy for a potential toll road concession, and dealt specifically with Attorney Bill Thomas. At Thomas's recommendation, Itinere S.A. retained The Vectre Corporation ("Vectre"), a lobbying and public relations firm based in Richmond. H. Benson "Ben" Dendy of The Vectre Corporation headed the Itinere team. Submission, p. 7.

<sup>1</sup> In an informational memorandum dated April 7, 2009, we advised the Commission of our intentions to pursue this matter through FTR, along with the reasons why we believe FTR is appropriate in this instance.

<sup>2</sup> A limited liability company ("LLC") is a business entity that is recognized as a limited liability company under the laws of the state in which it is established. 11 C.F.R. § 110.1(g)(1). An LLC that makes a contribution shall, at the time it makes the contribution, provide information to the recipient committee as to how the contribution is to be attributed, based on whether the LLC has elected to be treated as a partnership or as a corporation by the Internal Revenue Service ("IRS"). 11 C.F.R. § 110.1(g)(5). The LLC must also affirm to the recipient committee that it is eligible to make the contribution. *Id.* Itinere N.A. and Itinere Infrastructure filed an Entity Classification Election, Form 8832, with the IRS "electing to be classified as an associate taxable as a corporation," effective March 5, 2007.

After the retention, Itinere eventually made 67 campaign contributions totaling \$55,500 to 57 different candidates or party committees in Virginia

**1. Legal Advice Regarding Virginia Contributions**

Seeking assurance that the contributions would be lawful, in a May 2, 2007, e-mail message, Ferreyra requested that Thomas "send to us the main pieces of legislation regulating this activity[.]" Submission, p. 9. In response, Lane Needler, Thomas's partner at Reed Smith, produced a memorandum dated May 7, 2007, entitled "Political Contributions in Virginia – The Campaign Finance Disclosure Act of 2006." Submission, p. 10. This memorandum concluded "there is only one prohibition on contributions, a prohibition on fundraising by and for statewide and state elected officials while our General Assembly i[s] convened in its 'regular' session each year." *Id.* The memorandum discussed only Virginia law and did not mention federal election laws at all.

Ferreyra forwarded the May 7, 2007, memorandum to Valentin Duenas of the legal office of Grupo Sacyr Vallehermos, S.A. ("Sacyr Group"), the "top parent company" in the chain of Itinere companies, which maintained an office of in-house lawyers in Spain to support subsidiary companies.<sup>3</sup> Duenas requested more practical information about the Virginia campaign contribution plan, but ultimately encouraged Itinere to "rely on the advice of competent U.S. counsel and advisors instead of the Sacyr Group legal office, which did not have any expertise in U.S. election laws." Submission, p. 13.

By e-mail on May 18, 2007, Thomas sent a second memorandum to Ferreyra, providing a practical and procedural explanation of Virginia campaign laws and the planned contributions, including the following approach:

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<sup>3</sup> The Sacyr Group is organized under the laws of and headquartered in Spain.

- Your consultants (in this case both the Vectre Corporation and Reed Smith LLP) should recommend an overall budget to Itinere, for the calendar year 2007 ...
- Your consultants should then, on a periodic basis during the year, recommend specific contributions to specific members and candidates for the Virginia House of Delegates and the Virginia State Senate ...
- You will also receive a few recommendations from your consultants to contribute to a particular Caucus or group campaign committee ...
- Itinere, through you and other appropriate officers, should then review the consultant-recommended contributions;
- Once that review has occurred, and where there is concurrence in the recommendation, Itinere should prepare a check from the appropriate U.S. based business entity. ...
- In most instances, contributions will be recommended where candidates have requested contributions and there are specific fundraising events. ...

Submission, pp. 13-14. As with Reed Smith's earlier memorandum, the May 18, 2007, memorandum did not mention federal law. Also on May 18, 2007, Thomas forwarded to Ferreyra a short list of the "first round of suggested political contributions." Ultimately, with Itinere S.A.'s approval of the overall Virginia contribution plan, the Submission states that, from June 2007 through early January 2008, Itinere N.A. made 67 campaign contributions totaling \$52,750 to 57 different candidates or party committees in Virginia. See Attachment 2. We note, however, that our review of the contributions databases maintained by the Virginia Public Access Project reflected 4 additional contributions totaling \$2,750 made between January 3 and January 6, 2008. *Id.* Thus, the contributions at issue appear to total \$55,500. All of the operating funds for Itinere N.A., including all funds for the Virginia campaign contributions, were provided by its immediate parent, Itinere Infrastructure, LLC. Submission, p. 18. Itinere Infrastructure, LLC, in turn, received all the funds from its immediate parent, Itinere S.A., a company organized and headquartered in Spain. *Id.*

**2. Legal Advice Regarding Potential Texas Contributions**

While the Virginia campaign contribution plan was being developed, Ferreyra asked attorney Jose Luis Vittor of Bracewell & Giuliani for a memorandum outlining the laws and regulations applicable to political contributions and lobbying in Texas. On May 25, 2007, Vittor provided a memorandum regarding "Preliminary Considerations Associated With Political Giving and Lobbying Activity in Texas." Submission, p. 15.

The memorandum begins as follows: "Pursuant to our conversation, this memorandum briefly sets out restrictions on political activity in the State of Texas by foreign nationals or entities as well as preliminary considerations involved in engaging in lobbying activity in the state." *Id.* The memorandum quotes the foreign national contribution prohibition at 2 U.S.C. § 441e, stating:

It shall be unlawful for –

(1) a foreign national, directly or indirectly, to make –

(A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election

Submission, Attachment 3, p. 1. The memorandum then defines a foreign national as "someone who is not a United States citizen or lawfully admitted as a permanent resident of the United States" and continues to address lobbying in Texas. *Id.*

The Submission points out that the memorandum does not state that a foreign corporation could be a "foreign national" and does not explain how or if the prohibition would apply to Itinere, "given Itinere N.A.'s position as a U.S. limited liability company subsidiary of a foreign corporation." Submission, p. 16. According to the Submission, Ferreyra immediately forwarded this memorandum to personnel of the Sacyr Group (in Spain) without

1 reading it. The Submission further states that the personnel who received the memorandum  
2 did not suspect that political contributions in Virginia by Itinere N.A. would be prohibited,  
3 because they all believed that Itinere N.A., as a Maryland limited liability company, was not a  
4 "foreign national" under the language of Section 441(e) quoted in the memorandum. Their  
5 understanding was reinforced in their minds by the fact that Reed Smith had advised them that  
6 the contributions in Virginia were lawful. In addition, the Submission notes that Itinere  
7 decided to turn its focus from the Texas project to more immediate projects, and, as a result,  
8 the Texas memorandum was filed away without further action and played no role in Itinere's  
9 decision to proceed with the Virginia contributions.

10 **3. Discovery of the Violations**

11 According to the Submission, Itinere became aware that its Virginia contributions may  
12 have been illegal on July 3, 2008, when Dendy sent an e-mail enclosing a newspaper article  
13 about admissions of improper contributions by Transurban USA, another concession  
14 company. Submission, p. 19. According to the news article, Transurban, the U.S. subsidiary  
15 of an Australian company, violated the Act by making political contributions to nonfederal  
16 candidates. See Anita Kumar, *Toll Road Firm Made Illegal Contribution*, WASHINGTON  
17 POST, July 3, 2008, at B05.<sup>4</sup> Itinere then began a preliminary internal investigation into the  
18 facts and scope of the contributions, and on July 18, 2008, contacted Peckar & Abramson,

<sup>4</sup> The Commission recently settled MUR 6093 (Transurban USA), the enforcement matter related to the events reported in the July 3, 2008 news article. Transurban Group, an Australian-based international toll road developer and manager, filed a *sua sponte* submission to disclose the discovery that its U.S. subsidiaries violated 2 U.S.C. § 441e. From September 2005 to February 2008, Transurban USA made \$177,000 in non-federal campaign contributions to candidates for state office in Virginia and Virginia state political action committees. As in the instant matter, Transurban USA had also received erroneous legal advice from The Vectre Corporation. The Commission found reason to believe that Transurban Group and Transurban USA Inc. violated 2 U.S.C. § 441e, and approved a conciliation agreement containing a \$33,000 civil penalty which the Commission had reduced by the full 75% discount contemplated in the Commission's Policy Statement on Sua Sponte matters. See 72 Fed. Reg. 16,695 (Apr. 5, 2007).

which conducted an independent investigation, filed a Preliminary Notice of Potential Violations with the Commission on July 25 and September 4, 2008, and filed the Submission with the Commission on October 8, 2008. In addition, the Submission states that Itinere N.A. has sent a letter to every recipient of an improper contribution that explains the nature of the contribution(s) and requests that the recipient disgorge the funds to the U.S. Treasury. Submission, p. 28; *see* Sample Letter, Submission, Attachment 4.

**A. Legal Analysis**

At issue is whether Respondents violated 2 U.S.C. § 441e when Itinere N.A. made non-federal contributions to State candidates and political committees in Virginia with funds provided by its foreign parent corporation. It is unlawful for a foreign national, directly or indirectly, to make a contribution or donation of money or other thing of value in connection with a Federal, State, or local election, or to a committee of a political party. 2 U.S.C. § 441e(a)(1)(A), (B); 11 C.F.R. § 110.20(b). Additionally, a foreign national may not directly or indirectly make an expenditure, an independent expenditure, or a disbursement in connection with a Federal, State, or local election. 2 U.S.C. § 441e(a)(1)(C); 11 C.F.R. § 110.20(f). Likewise, Commission regulations prohibit foreign nationals from directing, dictating, controlling, or directly or indirectly participating in the decision-making process of any person, such as a corporation, with regard to such person's Federal or nonfederal election-related activities, including decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office. 11 C.F.R. § 110.20(i).

A "foreign national" is an individual who is not a citizen of the United States or a national of the United States and who is not lawfully admitted for permanent residence.



2 U.S.C. § 441e(b)(2). The term likewise encompasses “a partnership, association,  
corporation, organization, or other combination of persons organized under the laws of or  
having its principal place of business in a foreign country.” 2 U.S.C. § 441e(b)(1) (citing 22  
U.S.C. § 611(b)(3)).

In determining whether a U.S. subsidiary of a foreign national corporation is permitted  
to make contributions to state and local committees, the Commission, in past Advisory  
Opinions, has looked at two factors. First, the Commission assesses whether the subsidiary is  
predominantly funded by the foreign national such that a contribution by the subsidiary is  
essentially a contribution from the foreign national. Second, the Commission considers the  
status of the decision-makers involved. *See* Advisory Opinion 2006-15 (TransCanada  
Corporation) (wholly-owned domestic subsidiaries of a foreign corporation may donate funds  
in connection with state and local elections, subject to state law, as long as no foreign national  
participates in decision-making, except for setting overall budget amounts, and the funds do  
not come from a foreign national); Advisory Opinion 1989-20 (Kuilima) (U.S. subsidiary of a  
foreign corporation may not use a PAC to make contributions when the PAC is funded almost  
exclusively by the foreign parent and no director or officer of the company or its parent who  
is a foreign national may participate in any way in the decision-making process with regard to  
making the proposed contributions).

In this case, Itinere N.A., LLC, and Itinere Infrastructure, LLC, are U.S. subsidiaries  
of their foreign national parent, Itinere S.A. Respondents acknowledge that all of the  
operating funds for Itinere N.A., including all funds for the Virginia campaign contributions,  
were provided by its immediate parent, Itinere Infrastructure, LLC. Itinere Infrastructure,  
LLC, in turn, received all the funds from its immediate parent, Itinere S.A., a company

1 organized and headquartered in Spain. Because the Respondents used funds derived from a  
2 foreign parent company to make contributions to nonfederal candidates and political  
3 committees, we conclude that Itinere North America, LLC, Itinere Infrastructure, LLC, and  
4 Itinere Infraestructuras, S.A. violated 2 U.S.C. § 441e.

5 We have processed this matter through "FTR," by which a respondent may proceed  
6 directly into conciliation prior to a formal finding by the Commission. Consistent with the  
7 general criteria for FTR, we note that: (1) all three Itinere companies involved with the  
8 contributions at issue have joined in the Submission and acknowledged their violations of the  
9 Act; (2) those violations do not appear to have been knowing and willful; (3) the Submission  
10 is substantially complete and reasonably addresses the significant issues related to the  
11 violations; and (4) the factual and legal issues are reasonably clear.

**III. PROPOSED CONCILIATION**

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**Pre-MUR 480 (Itinere North America, LLC *et al.*)  
First General Counsel's Report**

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IV. **RECOMMENDATIONS**


- 1) Open a MUR;
- 2) Accept the attached Conciliation Agreement with Itinere North America, LLC, Itinere Infrastructure, LLC, and Itinere Infraestructuras, S.A. prior to a finding of reason to believe;
- 3) Approve the appropriate letter;
- 4) Close the file.

Thomasenia P. Duncan  
General Counsel

6/15/09  
Date

BY:

  
Ann Marie Terzaken  
Associate General Counsel  
for Enforcement

  
Stephen A. Gura  
Deputy Associate General Counsel  
for Enforcement

  
Julie K. McConnell  
Assistant General Counsel

  
Tracey L. Eigon  
Attorney

Attachments:

2. Chart of Contributions

**Itinere Political Contributions Referenced in Submission**

<b>Amount</b>	<b>Recipient</b>
\$4,500	Republican Party – Virginia Senate Republican Leadership Trust
\$3,500	Moving Virginia Forward
\$3,000	Democratic Party – Commonwealth Victory Fund
\$3,000	Dominion Leadership Trust
\$3,000	Saslaw for Senate
\$3,000	Stosch for Senate
\$2,000	Democratic Party – Virginia Senate Caucus
\$2,000	Griffith for Delegate
\$1,000	Kilgore for Delegate
\$1,000	Williams for Senate
\$1,000	Tyler for Delegate
\$1,000	Hamilton for Delegate
\$1,000	Moran for Delegate
\$1,000	Armstrong for Delegate
\$500	Bell for Senate
\$500	Quayle for Senate
\$500	Dance for Delegate
\$500	Ingram for Delegate
\$500	Hugo for Delegate
\$500	Alexander for Delegate
\$500	Albo for Delegate
\$500	Shannon for Delegate
\$500	Ward for Delegate
\$500	Bouchard for Delegate
\$500	Whipple for Senate
\$500	Howell for Senate
\$500	Marsh for Senate
\$500	Lingamfelter for Delegate
\$500	Watts for Delegate
\$500	Suit for Delegate
\$500	Deeds for Senate
\$500	Rerras for Senate
\$500	Purkey for Delegate
\$500	Cosgrove for Delegate
\$500	Janis for Delegate
\$500	Colgan for Senate
\$500	Houck for Senate
\$500	Joannou for Delegate
\$500	Gear for Delegate
\$500	Martin for Senate
\$500	Rust for Delegate
\$500	Welch for Delegate

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\$500	Miller for Senate
\$500	Spruill for Delegate
\$500	Lucas for Senate
\$500	McEachin for Senate
\$500	Locke for Senate
\$500	May for Delegate
\$500	Jones for Delegate
\$500	Iaquinto for Delegate
\$500	Blevins for Senate
\$500	BaCote for Delegate
\$500	Puller for Senate
\$500	Tata for Delegate
\$500	Lewis for Delegate
\$250	Amundson for Delegate

Total = \$52,750

**Additional Itinere Political Contributions**

Amount	Recipient
\$1,000	Dominion Leadership Trust
\$1,000	Griffith for Delegate
\$500	Tyler for Delegate
\$250	Amundson for Delegate

Total = \$2,750